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No. 07-1366

IN THE

Supreme Court of the United States

STACEY STANTON; MICHAEL FRIAS; BRIAN LANG; JOHN SPEARMAN; TERRY CONNOR; WILLIAM A. ORDWAY; and LELA STEFFEY, Members of the Arizona License Plate Commission,

Petitioners,

v.

ARIZONA LIFE COALITION, GARY PAISLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review when there exists no conflict—but instead unanimity—among all the circuits on the question raised by this case, *viz.*: When the State invites private speakers to present their own messages on a designated area of a license plate, may it then censor those speakers because of the viewpoint of this speech?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Arizona Life Coalition states that it is a non-profit corporation in the State of Arizona. Arizona Life Coalition does not have a parent corporation and is not publicly held.

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INTRODUCTION

Bumper stickers, vanity plates, and specialty plates represent three commonplace ways a vehicle owner can communicate messages. The decision to display such messages is plainly that of the vehicle owner, not the State, and thus is *private* speech. The petition for certiorari in this case relies upon the opposite, highly counterintuitive proposition: that the *government* speaks through the privately chosen and designed message of a vanity or specialty plate. This Court should decline the invitation to review a case founded upon such an implausible proposition.

The Ninth Circuit's unanimous decision below presents an entirely unremarkable conclusion: that government officials may not discriminate against private speakers' viewpoints within a State-created speech forum to which those speakers have statutorily-authorized access. The Petitioners, though now acknowledging their viewpoint-based censorship, urge a categorical immunity from First Amendment restraints for State officials administering a speech forum involving license plates. This unprecedented proposal runs contrary to every federal court case to consider the general issue of license plate speech, as well as this Court's settled speech-forum analysis.

Moreover, the circuit conflict Petitioners assert to have resulted from the decision below is erroneously premised on a comparison of apples and oranges: the different case conclusions on whether speech was private resulted because one case involved speech of a State legislature, and the other

of a private community group. Yet Petitioners simplistically identify the difference in case outcome as indicative of a circuit conflict—never countenancing the plain reality that different facts yield different results under the same legal standard. There is no circuit conflict on the question raised by Petitioners, and no reason for this Court to grant certiorari review.

STATEMENT OF THE CASE

I. Material Facts

Arizona law requires that qualifying non-profit organizations upon application be allowed to obtain a unique license plate that carries the organization's name, logo, and slogan. *See* A.R.S. § 28-2404. Respondent Arizona Life Coalition complied with all statutory criteria in submitting its application for such a plate. But Petitioners, the members of the Arizona License Plate Commission, denied the application because of the viewpoint communicated by Life Coalition's name, logo, and slogan on its plate design. The governing statutes do not authorize the Commission to reject proposed plates on the basis of the message they bear. *Id.*

A. License Plates in Arizona

There are two general categories of motor vehicle license plates in Arizona. First, standard plates bear a random alpha-numeric identifier, and are the default choice for Arizona motorists. *See* A.R.S. § 28-2351(B). There is no fee for standard license plates. *Id.* at § 28-2351(A). Second, "special plates" are license plates that differ in some regard

from the standard design. *See* A.R.S. § 28-2401(2). Unlike standard plates, motorists who desire special plates must pay an additional fee. *See* A.R.S. § 28-2402.

There are three types of special plates. First, a "personalized" special plate bears an alpha/numeric identifier that has been chosen by the motorist. A.R.S. § 28-2406. Second, there are plates that have been individually authorized by the legislature through the normal legislative process. *See, e.g.*, A.R.S. § 28-2417 (authorizing child abuse prevention special plates); § 28-2422 (authorizing spaying and neutering of animals special plates). Third, "special organization plates" are available through an administrative process that involves the Arizona Department of Transportation ("Department") and the Arizona License Plate Commission ("Commissioners" or "Petitioners"). *See generally* A.R.S. § 28-2404. The legislature has no role in designing the content of a special organization plate. A portion of the proceeds from special organization plates go to the sponsoring organization. *Id.* at § 2404(F). Special organization plates are the subject of this lawsuit.

B. The Special Organization License Plate Program

Arizona law sets forth an administrative procedure for select nonprofit organizations to obtain a special organization license plate. *See generally* A.R.S. § 28-2404. Organizations must complete a form prescribed by the Department. A.R.S. § 28-2404(A). The form includes a "template" for organizations to submit their requested plate

designs. Stip. Facts (Dkt. 35) Ex. 19. The top of the template reads, "Please use plate template below to submit your design." *Id.* Instructions in the left margin of the template invite the applicant to "[u]se this block for your logo." *Id.* And instructions at the bottom, right corner of the template instruct: "Use this space for your organization name or slogan. Maximum number of 20 characters." *Id.*[1]

Once a nonprofit organization has submitted its request to the Department, the Department determines if the organization meets the requirements of A.R.S. § 28-2404(G)(2). The organization must be a registered nonprofit organization in Arizona and it must certify either that it has at least 200 members, or that it agrees to pay the production and program costs for the special organization plates. A.R.S. § 28-2404(C)(5). If the Department determines that the organization meets these requirements, it forwards the request to the Commission. *Id.* at 28-2404(A). The Commissioners are then charged with the exclusively ministerial determination of whether the organization qualifies for issuance of a special organization plate. The standards for this limited determination are set forth in A.R.S. § 28-2404(B):

> The commission shall determine and inform the department whether the requested special organization plate is authorized. The

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[1] The Commissioners have excised all the foregoing quoted text from their reproduction of this portion of the exhibit, and have attached this as Appendix D to their brief. Life Coalition has attached hereto as an Appendix the exhibit portion as it actually appears, without these critical redactions.

> commission *shall authorize* a special organization plate if the organization meets the following requirements:
>
> 1. The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name.
>
> 2. The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale.
>
> 3. The purpose of the organization does not promote a specific religion, faith or antireligious belief.

(Emphasis added.)

C. Life Coalition's Application for a Special Organization Plate

Life Coalition is an Arizona non-profit organization, comprising both organizational and individual members. Stip. Facts (Dkt. 35) at 2, ¶ 1. Life Coalition exists to provide compassionate care to women who are considering abortion, or who are affected by abortion. *Id.* at 8, ¶ 25. The organization submitted an application to the Department that would display its official logo (a small graphic of two children's faces) and its motto "Choose Life." *Id.* at ¶ 22. The Department confirmed that Life Coalition was a qualified organization under A.R.S. § 28-2404(G)(2) and forwarded the request to the Commission. *Id.* at ¶ 24.

The Commissioners first considered Life Coalition's application at their August, 28, 2002 meeting (*id.* at 11, ¶ 32), and expressed reservations about Life Coalition's motto on the plate, including concern that other organizations may be motivated to seek plates with differing viewpoints, and that Life Coalition's plate could be perceived as expressing State approval of its message. *Id.* at 11, ¶¶ 36, 38. Life Coalition's representative offered to immediately amend the application to include also the organization's name, but the Commission tabled Life Coalition's plate request pending additional information and to seek legal advice. *Id.* at 11-12, ¶¶ 34, 38-39. On September 27, 2002, Life Coalition submitted to the Department a revised application containing Life Coalition's name as well as its logo and slogan in the plate design.

Fully one year later, on August 28, 2003, the Commission finally met again and considered Life Coalition's revised plate application. *Id.* at 13, ¶ 44. At this time the Commissioners solicited information from Life Coalition's representative confirming that the organization qualifies for a specialty plate under the governing statute. *Id.* at 15-16, ¶¶ 55-63. The Commissioners thereupon withdrew for discussion with counsel in executive session, after which they returned and formally denied Life Coalition's application. *Id.* at 16-18, ¶¶ 65, 70-80. The Chairwoman of the Commission refused to offer an explanation for the denial, and disallowed questions or further discussion of the matter. *Id.* at 18, ¶¶ 83-84.

II. Proceedings Below

On September 2, 2003, Life Coalition filed suit in the United States District Court for the District of Arizona against the Commission, alleging that the Commission violated its First Amendment and equal-protection rights by denying its application. Cmplt. (Dkt. 1) at 14. The parties filed Cross Motions for Summary Judgment based on stipulated facts. Pls. SJ. Mtn. (Dkt. 34), Stip. Facts (Dkt. 35), Pls. Amdt. SJ. Mtn. (Dkt. 39), Dfs. Crs. SJ. Mtn. (Dkt. 45). The district court denied Life Coalition's motion for Summary Judgment and granted the Commission's motion for Summary Judgment. Pet. App. B (Dkt. 54).

Addressing the question of who is speaking on special organization plates, the district court utilized the four-factor analysis first applied to license plate speech by the Fourth Circuit in *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). Pet. App. 5b-13b. The district court concluded that the speech on special organization license plates was "governmental in nature" (*id.* at 24b), though it nonetheless went on to analyze the case through the lens of private speech forum analysis. *Id.* at 13b-20b. The district court found that the special organization program was a nonpublic forum, and that the Commission's ban on Life Coalition's speech was reasonable and viewpoint neutral. *Id.* at 17b-20b.

On appeal, the Ninth Circuit reversed. *Ariz. Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008), Pet. App. 1a. The Ninth Circuit held that the

organization's identifiers on special organization plates are private speech, not the speech of the government. *Id.* at 21a. The court rested this conclusion on both the four-factor test formulated by the circuit courts of appeal, and this Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). The court noted that the Sixth Circuit in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir.), *cert. denied*, 126 S.Ct. 2972 (2006) relied on *Johanns* to the exclusion of the four-factor test (*id.* at 11a), but the Ninth Circuit determined that these two tests contained similar considerations, and the court adopted both standards for its analysis of the case. *Id.* at 14a.

In reaching its private speech determination, the court reasoned that the specialty plate program opened a forum to philanthropic organizations for presentation of their logo and motto, and allowed "exercise of First Amendment rights in the hopes of raising money to support their cause." *Id.* at 16a. The court next emphasized that the idea and message for the Choose Life plate originated with Life Coalition—not the legislature. The legislature regulated only the category of eligible participants, not the speech content that may be presented on the plates. *Id.* at 17a-18a. The court additionally found that the plate messages are associated with the driver or owner of the vehicle (*id.* at 18a-20a) and that such messages are controlled by the participating organization and the private persons who voluntarily decide to display the message. *Id.* at 21a.

After determining that Life Coalition's "Choose Life" message was private speech, the Ninth Circuit went on to find that the special organization plate program was a "limited public forum." *Id.* at 28a. The court found that forum was open to Life Coalition's speech, and the Commissioners' actions impermissibly targeted Life Coalition's viewpoint. *Id.* at 32a. The Ninth Circuit also found that the restriction on Life Coalition's speech was unreasonable because Life Coalition met all statutory requirements to obtain its plate, its speech fit within the purpose for the forum, and the Commissioners ignored the statutory mandate requiring authorization of the organizational plate. *Id.* at 33a.

REASONS FOR DENYING THE WRIT

The Commissioners seek review on the implausible ground that the Ninth Circuit's decision identifying Life Coalition's plate design as private speech creates a conflict with the Sixth Circuit's *Bredesen* decision. Such a conflict does not exist, for the *Bredesen* case rested upon a crucially different set of facts. A message designed by the State legislature (as in *Bredesen*) is categorically different than one generated by a private party like Life Coalition—and a different classification of the nature of each does not entail a conflict in the legal standard applied.

The Commissioners, moreover, propose a novel, unprecedented legal test that even *Bredesen* does not endorse. Specifically, the Commissioners propose a rule that all speech found on license plates is *per se* government speech. Under this theory,

government officials' viewpoint-based exclusions of private speakers from license plate speech forums (whether vanity plates or organizational plates) would be immune from First Amendment scrutiny, in every instance. No court has adopted such a radical departure from forum analysis standards, and the Commissioners present this Court no legitimate reason to do so here.

I. THERE IS NO CONFLICT BETWEEN THE NINTH AND SIXTH CIRCUITS.

The Commissioners ask the Court "to settle a dispute among the federal courts about whether the States' specialty license plates constitute government speech." Pet. 2. But the differing case outcomes the Commissioners identify resulted from significant factual differences, not application of inconsistent legal principles.

The Commissioners urge that the Ninth Circuit, by identifying Life Coalition's plate design as private speech, ruled "in direct conflict with the Sixth Circuit in *Bredesen*, 441 F.3d at 375 (message on the face of Tennessee specialty license plates is government speech)." Pet. 8. An examination of *Bredesen* reveals this assertion to be false.[2]

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[2] Petitioners claim that the Ninth Circuit "acknowledged" that the Sixth Circuit's decision in *Bredesen* presented the opposite conclusion of its private speech determination, "'on nearly identical facts.'" Pet. 6, 7 (quoting the Ninth Circuit's opinion, Pet. App. 11a). The truth is that the Ninth Circuit nowhere acknowledged a conflict with the *Bredesen* decision. The sentence fragment ("on nearly identical facts") that the Commissioners extract from its context in the opinion was

In *Bredesen*, the Sixth Circuit evaluated whether a "Choose Life" message on a Tennessee license plate constituted private speech or government speech. The court noted that the plate's message had been "government-crafted" and specifically chosen and controlled by the Tennessee legislature itself, which had "spelled out in the statute that these plates would bear the words 'Choose Life.'" 441 F.3d at 376. The court offered that "[s]o long as Tennessee sets the overall message and approves its details, the message must be attributed to Tennessee[.]" *Id.* at 377. The subtext of the court's analysis in *Bredesen* is that if the message had originated with or been controlled by a private party—as in the present case—the speech on the license plate would have been private.

Life Coalition's name, logo, and slogan would appear on an organizational plate which it had designed and for which it had applied in response to the State's categorical invitation to nonprofit community groups. The Ninth Circuit's unexceptional finding that such a plate design is private speech is thus entirely consistent with *Bredesen*. Indeed, there is no reason to think that the Sixth Circuit could have reached a different result in this case than did the Ninth Circuit. While the court in *Bredesen* emphasized that the Tennessee legislature had been the source of the message in that case so as to conclude the speech was that of the government, the Ninth Circuit conversely emphasized the Legislature's *non-*

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presented by the court in comparing Fourth Circuit and Sixth Circuit cases, not (as the Commissioners assert) the Sixth Circuit's *Bredesen* decision and this case. *See* Pet. App. 11a.

involvement to identify the private classification of the speech: "the statutory requirements address who may speak, not what they may say." Pet. App. 17a. "[T]he idea of a 'Choose Life' license plate originated with Life Coalition. While the Commission determined whether Life Coalition met the statutory guidelines for gaining access to the license plate forum, Life Coalition determined the substantive content of their [sic] message." *Id.* at 18a.

Thus, the Ninth Circuit's decision in this case was consistent with *Bredesen* (and all other extant federal caselaw) on the material point. While *Bredesen* is in conflict with the Fourth Circuit's decision in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004), that dispute is limited to the classification of *legislatively*-designed license plate messages.[3] The present case involves no such scenario. Rather, the relevant observation is that both *Rose* and *Bredesen*, notwithstanding the difference between them, are each consistent with the decision below regarding the private speech of Life Coalition. The Ninth Circuit's ruling is an uncontroversial application of settled First Amendment standards.

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[3] This Court has denied review of that conflict. *American Civil Liberties Union of Tennessee v. Bredesen*, 548 U.S. 906, 126 S.Ct. 2972 (2006).

II. THE COMMISSIONERS HAVE NOT DEMONSTRATED ERROR IN THE CONSENSUS RULE APPLIED BY THE NINTH CIRCUIT, NOR SHOWN THE MERIT OF THE UNPRECEDENTED ALTERNATIVE RULE THEY OFFER.

While alleging a conflict between the Sixth Circuit in *Bredesen* and the Ninth Circuit here, the Commissioners ultimately repudiate the legal analysis in both cases. The Commissioners assert that this Court's *Johanns* test (utilized by both the Sixth Circuit and Ninth Circuit) is limited to its facts and is of no utility in the license plate context. Pet. 14-15. Likewise, they reject the four-factor test (utilized by the Ninth Circuit below) for, they say, that test "*seems at least partially* responsible for the Ninth Circuit's failure to perceive" the supposed government voice in specialty license plates (Pet. 16, emphasis added)—hardly a rousing argument for the necessity of this Court's corrective intervention. So also do the Commissioners implicitly reject the less formulaic, presumptive-private analysis of the Second Circuit (*Perry v. McDonald*, 280 F.3d 159, 166-70 (2d Cir. 2001)), Eighth Circuit (*Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001)), and Eleventh Circuit (*Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003)).

In place of such reasoned jurisprudence, the Commissioners propose a novel standard that flatly denies the applicability of First Amendment restraints to specialty license plate cases. On this approach, all specialty plate forums would be open to unbridled discretion and viewpoint discrimination by

government officials for the reason that any speech on a license plate is, *ipso facto*, government speech. This result is achieved through the Commissioners' newly-introduced "typical viewer" standard, whereby the owner and editor of the message is irrelevant, and the unreasoned viewer's presumptions are determinative. *See* Pet. 14, 17, 18.

This is nothing like the "reasonable observer" construct in Establishment Clause analysis from which the Commissioners apparently drew inspiration. *See* Pet. 17. Instead of the objective, fully informed observer appearing in Establishment Clause cases, *see, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002), the Commissioners' "typical viewer" is necessarily uninformed, and steadfastly so. The Commissioners' proposed "viewer" believes that all speech on license plates is government speech, in every circumstance.

This is manifestly incorrect, if not simply absurd. No one but a genuinely obtuse observer would seriously contend that an "ILUVSUE" vanity plate or a "Scottish Rite Mason" organizational plate represents the speech of the government. But the Commissioners nonetheless emphatically insist that all speech appearing on a license plate is "quintessentially," "clearly," "unequivocally," "indelibly," "inevitably," and "irretrievably" identified with the government. Pet. 14, 16. No federal court agrees.

With *Bredesen* easily harmonized with this case, every other circuit that has evaluated First Amendment challenges relating to messages on custom license plates has treated that circumstance

as implicating private speech and thus subject to the constraints of the First Amendment. *See Children First Foundation, Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006) (summary order) ("custom license plates involve, at a minimum, some private speech"; First Amendment restraints apply); *Planned Parenthood of South Carolina v. Rose*, 361 F.3d at 798 (plurality) (specialty license plates a limited forum for expression); *Women's Emergency Network v. Bush*, 323 F.3d at 946-47 and n.9 (11th Cir. 2003) (private, not government speech on plate; First Amendment standards applied); *Sons of Confederate Veterans v. Commissioner of the Virginia Dept. of Motor Vehicles*, 288 F.3d at 621 (4th Cir. 2002) (special plates constitute private speech); *Perry v. McDonald*, 280 F.3d at 166 (2d Cir. 2001) (vanity plate speech "private individuals' speech on government-owned property"); *Lewis v. Wilson*, 253 F.3d at 1079 (8th Cir. 2001) (vanity plate messages private speech, subject to First Amendment standards).[4]

The Commissioners are petitioning this Court to review a case that does not implicate a circuit conflict, in order to overturn the unbroken consensus of courts that the First Amendment applies to license plate speech forums. The Commissioners proposed new rule is neither sensible nor justifiable. This Court should decline review.

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[4] District courts have reached the same conclusion. *See, e.g., Choose Life Illinois, Inc. v. White*, 2007 WL 178455, *7 (N.D. Ill. 2007) (choose life message on license plate is private speech); *Women's Resource Network v. Gourley*, 305 F.Supp.2d 1145 (E.D.CA. 2004) (First Amendment applied to custom plate program).

III. THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW.

Beyond the insurmountable substantive demerit of the Commissioners' application, there are a number of structural considerations that suggest this case is unsuitable for review.

To begin with, the Commissioners have violated State law in excluding Life Coalition from the specialty plate forum. As the Ninth Circuit explained:

> The Commission does not dispute that Life Coalition has met each of the statutory requirements. ... When an organization meets the requirements, the statute provides that '[t]he [C]omission *shall* authorize a special organization plate.' Ariz.Rev.Stat. s 28-2404(B) (emphasis added). By denying Life Coalition's application, although the organization and its message complied with the limited public forum's purpose as it is currently defined under Arizona law, the Commission ignored its statutory mandate and acted unreasonably[.]

Pet. App. 33a. It is incongruous, then, for the Commissioners to argue that excluding Life Coalition from the plate forum furthers the State's interest.

Similarly, there is otherwise no State interest at risk as a result of this case that would call for this Court's review. While the Commissioners sensationally offer that the Ninth Circuit has

transmuted the First Amendment into a "sword, giving citizens the power to force an unwilling government to convey their messages," Pet. 21, and otherwise has "failed to give the State ... legitimate control" over plate messages, Pet. 16, these statements woefully mischaracterize the significance of the court's ruling. It was the State that created this forum and invited groups like Life Coalition to speak within it. But for that statutory invitation, First Amendment saber rattling would be in vain. But once Arizona opened the forum, the officials implementing the program are forbidden by the First Amendment to censor otherwise qualified forum entrants because of their viewpoint.

Finally, there is no urgency calling for review of this case. There are (as the Commissioners point out, Pet. 12 n.2) several custom license plate cases working their way through the lower courts. Some involve organizations that have applied for approval of a "Choose Life" plate of that organization's own design, submitted as part of a State's specialty plate forum program. *Roach v. Vincent*, No. 08-1429, Eighth Circuit; *Choose Life Illinois v. White*, No. 07-1349, Seventh Circuit; *Children First Foundation, Inc. v. Legreide*, Civ. Action No. 04-2137 (D.N.J.); *Children First Foundation, Inc. v. Martinez*, Civ. Action No. 04-CV-927 (N.D.N.Y.). If a court of appeals were to decide such a case in a fashion that departs from the current circuit consensus reflected in the Ninth Circuit's decision, a genuine circuit conflict—and a legitimate review opportunity—would then arise.

IV. THIS COURT SHOULD NOT HOLD THIS CASE PENDING DETERMINATION OF THE UNRELATED *SUMMUM* CASE.

This Court should decline the Commissioners' request that it hold this petition pending the disposition of *Pleasant Grove v. Summum*, No. 07-665, *cert. granted* March 31, 2008. The *Summum* case deals with the control and display of government-owned monuments on public land, and a private party's attempt to compel government receipt and display of an unsolicited monument donated to it. Here, by contrast, the speech of select nonprofit organizations has been affirmatively invited by State legislative enactment. The Arizona special organization license plate program is designed for private organizations to speak about themselves and to raise money for their efforts. The application form for the plate program instructs applicants that the plate is for "your design," "your logo," and "your organization name or slogan." Stip. Facts (Dkt. 35) Ex. 19; *see* Resp. App. And the Commission is required by law to approve a special organization plate for every organization that applies and meets certain criteria. *See* A.R.S. § 28-2404(B) ("The commission shall authorize a special organization plate if the organization meets the following requirements. . . .").

The circumstances confronting the Court in *Summum* are far-removed from those presented in this case, and only the most attenuated comparison may be made, on a level of generality far too broad to call for holding this case pending the review of *Summum*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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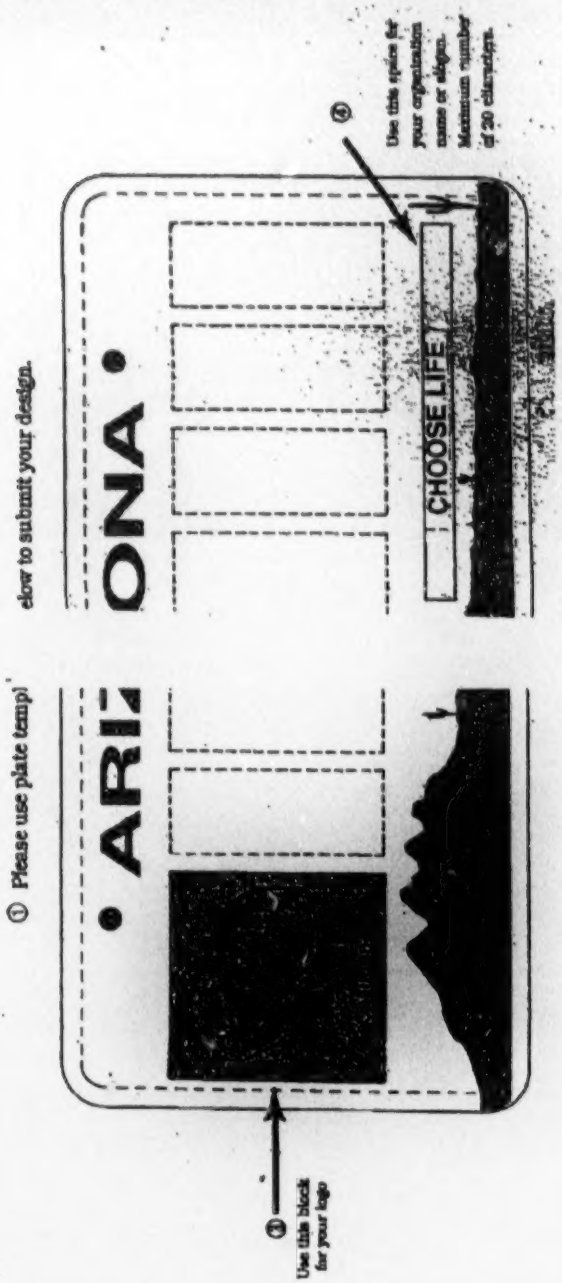
APPENDIX

APPENDIX

Plate application form, as found in pages 2 and 3 of Exhibit 19 to Stipulated Facts (Dkt. 35).


Use this space for your organization name or slogan. Maximum number of 20 characters.
CHOOSE LIFE
ONA
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